

MINUTES

MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 17, 2003 at 8:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 73, 1/10/2003
Executive Action: SB 30; SB 68; SB 39; SB 48
SB 57; SB 116

EXECUTIVE ACTION ON SB 30

SENATOR JERRY O'NEIL informed **CHAIRMAN GRIMES** that he received a letter from Lisa Mecklenberg Jackson, the Legislative Services Librarian, regarding jury trials in parental termination proceedings. **EXHIBIT(jus10a01)**.

CHAIRMAN GRIMES stated he had received the requested information regarding other states that allowed for jury trials in parental termination cases. **CHAIRMAN GRIMES** presented copies of that letter to the Committee. **EXHIBIT(jus10a02)**.

Motion: **SENATOR O'NEIL** moved **SB 30 DO PASS**.

Motion: **SENATOR MIKE WHEAT** moved **AMENDMENT SB003003.AVL BE ADOPTED**. **EXHIBIT(jus10a03)**.

Discussion:

SENATOR WHEAT explained that Amendment SB003003.avl was an attempt to prepare language that would protect the confidentiality and best interests of a child in the event a jury trial is requested. **SENATOR WHEAT** stated this amendment would require the court to schedule the trial at the earliest possible date, taking precedence over other matters. This amendment was meant to address concerns about delays having an adverse affect on children. The court would also have to determine if the testimony of the children would be relevant and, if so, would need to make a determination as to how the child's testimony would be presented during the trial. Finally, it would allow for the court to determine any other appropriate protective measures.

CHAIRMAN GRIMES discussed the option of a judge deciding whether there could be a jury trial, but there was objection by some Committee members to that concept. Second, the Committee focused on the need to protect the best interests of the child should a jury trial occur.

CHAIRMAN GRIMES asked **Valencia Lane** about the effect of (a) in the court system.

Ms. Lane responded there are already many procedures which need to be expedited, and under the current system, all abuse and neglect cases have to be expedited.

CHAIRMAN GRIMES stated it is the Committee's intent there not be any unnecessary delays.

SEN. JEFF MANGAN reminded **SENATOR WHEAT** the Committee had talked about making a guardian ad litem available and wondered whether that should be specified or if it would fall under (d). **SEN. MANGAN** wondered if there was a reason a provision for guardians ad litem was not included.

SEN. WHEAT stated his recollection was that this is not the beginning of the process, but rather the end of the process. At some point, DPHHS has intervened in the family structure, probably removed the child from the home, and placed the child in foster care. A guardian would be appointed for the child somewhere in the beginning of the process. If not, it could fall under subsection (d) as another protective measures for the child's best interests.

SEN. MANGAN stated his concern is more along the lines of, if and when a person gets to a jury trial, it would provide an opportunity for the judge to include the guardian ad litem in the process of assisting and making the decision on whether a child should testify and under what conditions. Even though this could happen under subsection (d), **SEN. MANGAN** was wondering if it should be specified.

SEN. WHEAT responded that it probably should be specified. The question is what should a judge do to protect the best interests of the child and that child's confidentiality.

CHAIRMAN GRIMES requested clarification from Valencia.

Ms. Lane drew the Committee's attention to 41-3-112, the section on guardians ad litem. **EXHIBIT(jus10a04)**. **Ms. Lane** wondered if the Committee wanted the amendment to say the guardian ad litem could agree or not agree to the jury trial. That decision would be a policy decision. **Ms. Lane** would like clarification on what is wanted in the amendment.

SEN. MANGAN feels the language is appropriate. **SEN. MANGAN** wanted to ensure the guardian ad litem would be consulted and, if a jury trial was going to occur, the guardian ad litem would be consulted for an opinion. **SEN. MANGAN** is satisfied that the language contained in 41-3-112 will address his concern.

SEN. JERRY O'NEIL, for discussion purposes, suggested striking, "If a jury trial is requested" at the beginning of subsection (5). **SEN. O'NEIL** feels we may want this all the time.

CHAIRMAN GRIMES feels that would cause problems with the title.

Ms. Lane indicated that this bill is amending this section on whether there is a jury trial. The procedures for protection of the child are already in Title 41, Chapter 3, and does not recommend making the amendment suggested by **SEN. O'NEIL**.

Vote: Motion **carried unanimously.**

Motion: **SEN. DAN MCGEE** moved **SB 30 DO PASS AS AMENDED.**

Discussion:

SEN. GARY PERRY likes the bill because of the right to jury trial. If a person has a right to a jury trial for a parking ticket, anyone who is being threatened with termination of parental rights, should have an equal opportunity to a jury trial. **SEN. PERRY** voiced his support for this bill.

CHAIRMAN GRIMES asked **SEN. O'NEIL** where the information contained in Exhibit 1 came from.

SEN. O'NEIL stated this was the result of a compilation of data obtained by the Legislative Services Librarian.

CHAIRMAN GRIMES raised several issues for the Committee's consideration. The first issue dealt with undue delay for the child, and the fact that a jury trial could extend the length of time a child is in foster care. Also, the increase in staff time, in light of the current budget shortfalls and the intense caseloads social workers have right now, could cause more pronounced problems to occur. **CHAIRMAN GRIMES** is worried about this bill having an unintended consequence.

(Tape : 1; Side : B)

SEN. BRENT CROMLEY feels this bill will add to the delay already being experienced by the court system. **SEN. CROMLEY** is a firm believer in jury trials, but believes this is a question of equity and not of law. Many important decisions are not made by juries, such as foreclosure, which is also an equity action. In **SEN. CROMLEY'S** opinion, this bill asks the court to consider a number of equitable factors. **SEN. CROMLEY** circulated 41-3-609, which lists a number of equitable factors. **EXHIBIT(jus10a05)**. **SEN. CROMLEY'S** primary objection is this bill will add another delay.

SEN. MANGAN does not support SB 30 and feels there are issues which need further consideration. The amendment goes along way in ensuring the child's confidentiality rights, but in rural

areas, privacy will be a concern. **SEN. MANGAN** stated because of the proposed redistricting, a large portion of the state may not have access to an expedient form of justice in a termination proceeding and the parties may have to travel long distances. Currently, foster care families receive approximately \$14 a day to take care of a child. This amount could go down to as little as \$8 a day in the future. This could mean less foster care placements available or less quality of care. **SEN. MANGAN** noted it costs more to kennel a dog for a day than it does to pay someone to take care of a child for a day. On the positive side, there are other states which have rampant problems in their foster care system, and those problems are not seen in Montana. Also, **SEN. MANGAN** does not feel that four states currently having this provision for jury trials creates a mandate for jury trials in parental termination proceedings. If a court-approved treatment plan has not been completed, that is when termination proceedings begin.

SEN. PERRY reminded the Committee that this bill does not deal with money, farms, or taxes. **SEN. PERRY** reiterated that the statistics show 99 percent of these cases will not go to jury trial. **SEN. PERRY** made the point that murderers are entitled to a trial by jury, and then appeals can go on forever. Why would we allow a government agency remove a child from a family with adding the protection for the family of a trial by jury? **SEN. PERRY** is concerned about the chance the agency would remove a child from a family in error.

CHAIRMAN GRIMES stated his intention is to call people's bluff. **CHAIRMAN GRIMES** complimented the department on their expertise in wading through false allegations against legitimate ones. **CHAIRMAN GRIMES** acknowledges that errors can be made but does not believe there are wide-spread abuses going on. If people really believe they are being wronged, then they can go ahead and take the case to court, in which case the bill will have a positive effect. **CHAIRMAN GRIMES** is concerned because some of the proponents' testimony did not even deal with parental termination, but rather just the fact that people were offended because the department intervened at all.

SEN. O'NEIL, at one point, was president of Victims of Child Abuse Laws (VOCAL) in Montana. **SEN. O'NEIL** has a couple hundred names in a data base of persons who believe they have been wronged by the system. The majority of times, the department is a very good resource for the state. **SEN. O'NEIL** does not feel this law will result in many jury trials simply because in many cases they do not know where the parents are or the parents are drug abusers. **SEN. O'NEIL** introduced an article entitled, "Social worker charged with extorting cocaine from client."

EXHIBIT(jus10a06). **SEN. O'NEIL** feels it is essential to have access to a jury trial in cases such as this. **SEN. O'NEIL** feels a jury trial will move the process along faster than cases decided by a judge, and will ensure the child is interviewed less often.

SEN. AUBYN CURTISS stated that she supports the bill since one of the biggest problems in society is the breakdown of families. If a person has a right to defend themselves in a criminal trial with a jury, then certainly they should have the same right in parental termination cases. **SEN. CURTISS** feels we have a duty to protect the basic rights of Montana people.

SEN. WHEAT stated he worked hard on the amendments, but cannot support the bill because the rights of the child, in his mind, are paramount and in most of the cases the parents have violated their parental rights to provide a clean, healthful, loving environment.

(Tape : 2; Side : A)

SEN. McGEE closed by stating the bill is about due process. **SEN. McGEE** feels the question is should we have a jury trial to determine whether a person has failed as a parent. **SEN. McGEE** stated he cannot imagine anything worse than a governmental agency coming into his home and taking his children. **SEN. McGEE** informed the Committee that the Department of Family Services can come and take a child out of the home simply based on their own perspective and this is not due process.

Vote: Motion carried 5-4 with Cromley, Mangan, Pease, and Wheat voting no, on a roll call vote.

HEARING ON SB 73

Sponsor: SENATOR DALE MAHLUM, SD 35, Missoula.

Proponents: Vivian Manuel, American Society for Prevention of Cruelty to Animals (ASPCA)

Linda Hughes, Director, Cascade County Humane Society, and Vice President, Montana Care Association

Opponents: None.

Opening Statement by Sponsor:

SEN. MAHLUM opened by stating SB 73 is a simple bill. **SEN. MAHLUM** has spoken with a veterinarian in Great Falls, who feels the current law is too lenient. In addition, the incident in Shelby, Montana, with the shelties, helped to bring about the drafting of this bill. SB 73 increases the fine from \$500 to \$1000 for the first offense and provides for a county jail term not to exceed one year, or both. The fine doubles for the second offense and requires a prison term not to exceed two years. **SEN. MAHLUM** feels the current statute needs to be updated.

Proponents' Testimony:

Vivian Manuel, representing herself and the American Society for Prevention of Cruelty to Animals (ASPCA), testified that one of the great measures of society is the compassion and humanity shown to those who cannot stand up and defend themselves. This bill addresses core issues relating to the treatment of animals and will help deal with the larger issue of domestic violence.

Ms. Manuel supports stricter penalties for animal abuse. **Ms. Manuel** submitted written testimony from J. Buckley from ASPCA. **EXHIBIT(jus10a07)**.

Linda Hughes, Director of the Cascade County Humane Society, and Vice President of the Montana Care Association, asked the Committee to support this bill since there has been an increase in animal cruelty. **Ms. Hughes** stated that the link between animal cruelty and domestic violence is very real, and it is time to strongly address this issue.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

CHAIRMAN GRIMES inquired of **SEN. MAHLUM** who had requested him to sponsor SB 73.

SEN. MAHLUM responded that this bill was the result of a telephone call he received from a veterinarian and many telephone calls after the Shelby incident.

CHAIRMAN GRIMES wondered how this bill would apply to the Shelby incident.

SEN. MAHLUM said the perpetrators were charged with the maximum allowed under state law.

CHAIRMAN GRIMES stated that under this bill the potential is there for someone to be in jail for up to one year. This is

qualified by "knowingly" or "negligently." **CHAIRMAN GRIMES** is concerned about the use of "or" and whether someone who did not seek veterinarian care for their animal could potentially end up in jail.

SEN. MAHLUM commented that language is part of the old legislation. **SEN. MAHLUM** said the veterinarians he has had experience with do an awful lot of work for no compensation.

SEN. O'NEIL wondered if changing the jail term from six months to one year would change the crime from a misdemeanor to a felony.

SEN. MAHLUM responded the first offense would be a misdemeanor and the second offense will be a felony.

SEN. O'NEIL wanted to know how **SEN. MAHLUM** knew the first offense would be a misdemeanor.

SEN. MAHLUM stated he made the same inquiry to Legislative Services and was told a felony would only result for the second offense.

Ms. Lane informed the Committee that under Title 45, it would not be considered a felony unless the imprisonment is in the state prison for a term exceeding one year. There are no monetary distinctions between a misdemeanor and a felony, only terms of imprisonment.

SEN. WHEAT wanted to know if any consideration was given to making the extended jail time and increased penalty apply only in instances where the court finds aggravated circumstances.

SEN. MAHLUM responded that in working with Legislative Services, their intention was to give an opportunity for a person with authority to show someone who is not properly taking care of their animals what can happen.

SEN. WHEAT posed whether someone who would starve their horses to death would change just because the legislature extended the jail time by six months and imposed a \$500 increase in the fines.

SEN. MAHLUM responded he did not believe the increase in fines and jail time would be a deterrent to someone who was starving his horses.

Closing by Sponsor:

SEN. MAHLUM closed by stating times have changed, and people who have animals must have consideration for the health and welfare

of those animals. This legislation will say if we determine you are not taking care of your animals, we will take your animals away from you and impose a fine.

EXECUTIVE ACTION ON SB 68

CHAIRMAN GRIMES explained that he re-referred SB 68 off the floor of the Senate back to Committee because of a technical problem in the title of the bill.

Ms. Lane further explained that upon looking more closely at the title of the bill and based on her discussions with John Conner, she discovered the title of the bill was wrong when it originally came to the Committee. **Ms. Lane** submitted proposed amendment **SB006803.av1** to accurately reflect the title of the bill and to better word subsection (1) (3). **EXHIBIT(jus10a08)**.

Motion/Vote: **SEN. MANGAN** moved that amendment **SB006803.av1** **BE ADOPTED**. The motion carried unanimously.

Motion/Vote: **SEN. MANGAN** moved that **SB 68 DO PASS AS AMENDED**. The motion carried unanimously.

(Tape : 2; Side : B)

EXECUTIVE ACTION ON SB 39

Motion: **SEN. CROMLEY** moved **SB 39 DO PASS**.

Motion: **SEN. PERRY** moved that **amendment SB003903.av1** **BE ADOPTED**.

Discussion:

SEN. CROMLEY informed the Committee that the subcommittee on SB 39 met and attempted to come up with a bill that would be satisfactory to most everyone. The subcommittee felt it was a good bill.

The first thing the subcommittee addressed was amendment SB003903.

CHAIRMAN GRIMES interjected that the proposed amendment constitutes a gray bill, so there is no reason to refer to the original bill.

SEN. CROMLEY agreed. **SEN. CROMLEY** then discussed the insertion of the word "knowingly" so the law would not be enforced against inadvertent or unwitting violators of the law.

Also, there was concern about the compartment in SUVs, which have an area behind the back seat which, technically, is not a trunk and can not be locked, but could serve as an area in which a half-used bottle of alcohol could be stored. That is permitted in subpart (c) of the amendment.

The third area the subcommittee studied was the geographic coverage to address the concerns about how broad of a geographic area this law would be enforced on. It seemed to be the intent that it should be enforced on the streets and shoulders, but not necessarily in parking lots or private driveways. Therefore, the language now is defined in Section 3, where it refers to 61-1-201. This will ensure the act will apply to normal roads traveled by cars and the shoulders.

SEN. MANGAN asked **SEN. CROMLEY** about the law must cover the passenger area of any motor vehicle including unlocked glove boxes and other areas accessible to the drivers and passengers and in Section 1, under (2)(b) would the storage compartment need to be specified further. In his SUV he has a storage compartment that opens up for maps, etcetera. Most cars have these type of storage compartments and would they be covered under (2)(b).

SEN. CROMLEY is familiar with the type of compartment **SEN. MANGAN** is referring to, and he feels it would come under the glove compartment and would need to be locked. This type of statute is similar to the littering statute and is important to have on the books, but probably is not going to be enforced that often. Having the statute on the books will be a deterrent in and of itself.

SEN. MANGAN feels that since we are dealing with the federal government holding dollars over the state's head, what would be the federal government's interpretation as to storage compartments that are available to the driver and the passenger. **SEN. MANGAN** asked for input from the other Committee members.

SEN. McGEE asked **TIM REARDON, Montana Department of Transportation (DOT)**, whether the proposed amendments would satisfy the federal requirements.

CHAIRMAN GRIMES pointed out that (8) defines "passenger area" and includes unlocked glove compartment and any area that is readily accessible to the driver or passenger.

SEN. MANGAN does not want to jeopardize federal funds and asked **Mr. Reardon** if the current language would suffice and would the storage compartments in passenger areas be considered glove boxes.

Mr. Reardon believes the gray bill will meet all of the federal criteria since most of the language was taken from a model bill.

SEN. PERRY pointed out that in (2) (b) "storage compartment" is listed twice. Secondly, **SEN. PERRY** suggested moving "storage compartment" to (2) (a) so that it would read "in a locked glove compartment or storage compartment." Then, if the storage compartment is not locked and it is in another area of the vehicle, it is addressed later on in the amendment, and if it is inaccessible to the driver or passenger, then it would be alright.

CHAIRMAN GRIMES was not sure if the result would then be that storage compartments would have to be locked. The storage compartment would only be an exception if it is not within the passenger area, and passenger area is defined as anything readily available to the passenger or driver.

SEN. CROMLEY felt the amendment suggested by **SEN. PERRY** would be a good one.

CHAIRMAN GRIMES asked **SEN. CROMLEY** to clarify the suggested modification to the amendment.

SEN. CROMLEY stated that (2) (a) would read "in a locked glove compartment or storage compartment;" and (b) would read "in a motor vehicle trunk, or luggage compartment or in a truck bed, storage compartment, or cargo compartment."

CHAIRMAN GRIMES likes the way the subcommittee defined "open alcoholic beverage container" so it alleviates the possibility of someone getting fined for picking up beer cans along side of the highway.

SEN. WHEAT inquired whether the subcommittee discussed the amount of the fines to be imposed under Section 1 and Section 2. One is a fine for possession of an open container and the other is for consumption of an alcoholic beverage. **SEN. WHEAT** feels consumption of the beverage while driving is a more aggravated offense.

SEN. CROMLEY responded they did not discuss this in the subcommittee. As stated previously, the subcommittee did not feel this type of offense, as a practical matter, may not be enforced that often. Obviously, the more serious offense will be driving under the influence. It could be addressed, however.

CHAIRMAN GRIMES added that was a very good point and that some states have a \$20 fine for open container. This could create a

learning curve by having a \$20 fine for open container and \$100 fine for consumption while operating a motor vehicle.

SEN. MCGEE agreed and followed up that adding "knowingly" back in identifies the person or persons who could be charged with either open container or consumption.

SEN. CROMLEY replied that "knowingly" does not necessarily mean they have to be driving.

SEN. MCGEE clarified his understanding by stating there are two conditions a person must meet: First, they are knowing and, second, they are in actual control of the vehicle. Therefore, someone could be in the backseat of a car consuming alcohol, and that person would not be guilty of consumption, but they would be guilty of open container.

SEN. CROMLEY responded that was his understanding as well.

SEN. PERRY feels the language in (2)(b) is ambiguous because (a) refers to a "locked" storage compartment and (b) refers to "storage compartment."

CHAIRMAN GRIMES explained the difference is in the word "truck." Therefore, the storage compartment it is referring to is in a truck.

Ms. Lane suggested it should be clarified that the storage compartment referred to in (b) is in the back bed of the truck and not within the cab of the truck.

Upon request from **CHAIRMAN GRIMES, Dave Galt, representing DOT**, suggested removing the reference to storage compartment in (b).

Motion/Vote:

SEN. PERRY moved Amendment SB003903.avl **EXHIBIT(jus10a09)** with the suggested revisions **BE ADOPTED. The motion carried unanimously. The amendment with the revisions will be SB003904.avl EXHIBIT(jus10a10).**

Motion:

SEN. MCGEE moved **SB 39 DO PASS AS AMENDED.**

CHAIRMAN GRIMES then asked DOT if they had any technical issues with the fine for possession being \$20 and consumption to \$100.

Mr. Galt replied the department does not have any objection to that change.

CHAIRMAN GRIMES feels this change will reflect a cultural change for Montana, while at the same time will concede that it will take awhile for Montanan's to adjust.

SEN. MANGAN stated that his DUI Task Force had issues on the other side with wanting to raise the fines.

Motion: **SEN. MANGAN** moved to amend page 2, line 5, and change the amount of \$100 to \$250.

Discussion: **SEN. O'NEIL** feels this bill is federal blackmail, and he does not feel we need to pay anymore ransom than what is asked for. **SEN. O'NEIL** is resistant to the proposed amendment.

SEN. PERRY feels that \$100 is an adequate fine.

SEN. WHEAT responded that he has a bill draft in to double the fines for people convicted of DUI and feels this is a serious problem on Montana's streets and highways. However, he feels that by increasing the fines in SB 39, there is a risk of creating something that can be used as a revenue stream, rather than as an effort to try and educate people on the roads about not having open containers. In principle, **SEN. WHEAT** agrees with **SEN. MANGAN**, but for purposes of this bill, he believes the fine should remain at \$100. **SEN. WHEAT** added that if someone is consuming alcohol while they are driving, more than likely they will be charged with DUI.

SEN. MANGAN closed on his amendment and stated that he appreciates the hard work of the subcommittee and that higher fines may assist in educating the public and bringing this issue forward.

Vote: The motion of **SEN. MANGAN** to raised the fine from \$100 to \$250 **failed 2-7**, with **Grimes** and **Mangan voting aye**.

Motion: **SEN. McGEE** moved to amend subsection (3) on page one, to make the fine \$20 for open container and leave the fine for consumption at \$100.

Discussion:

SEN. MANGAN stated he understands the reasoning behind this motion, but he feels lowering the threshold to that amount lessens legislative intent as far as the importance of this bill.

SEN. PERRY appreciates **SEN. MANGAN'S** concern and would like to offer a substitute amendment which would incorporate a learning curve. **SEN. PERRY** suggested implementing a \$20 fine for the first 12 months and then increasing the fine.

CHAIRMAN GRIMES felt this could cause problems in the code.

Ms. Lane explained an amendment such as this would require multiple versions and a delayed effective date. **Ms. Lane** stated the Code Commissioner would discourage this.

SEN. WHEAT agrees that reducing the fine to \$20 sends the wrong message.

SEN. O'NEIL stated that occasionally he picks up beer cans from the barrow pits adjacent to his property and that if he would get fined for having these open containers in his vehicle, \$20 is more than enough.

SEN. McGEE feels the arguments of **SEN. WHEAT** and **SEN. MANGAN** have prevailed, and he **withdrew his motion**.

CHAIRMAN GRIMES addressed **SEN. O'NEIL'S** concern about picking up trash and being charged with open container by directing him to Section 3, subsection (7) and the language that reads "the contents of which are partially removed or are immediately capable of being consumed." **CHAIRMAN GRIMES** feels this language will protect litter gatherers.

SEN. McGEE asked **SEN. WHEAT** if he was correct that with the \$100 fine for open container and \$100 for consumption, anyone behind the wheel will receive a \$200 fine.

SEN. WHEAT responded that anyone who is behind the wheel and has access to an open container as defined, they could be charged with unlawful possession of an alcoholic beverage. The fact that a person knowingly consumed the alcoholic beverage while they were driving the vehicle, would have to be proven at trial. **SEN. WHEAT** went on to explain there is a different level of proof for each offense. The driver could be charged with both crimes.

SEN. MANGAN drew the Committee's attention to the fact that the language reads "not to exceed \$100" which would give the judge some discretion.

Vote: The motion that **SB 39 DO PASS AS AMENDED** carried 8-1 with **O'Neil** voting no.

EXECUTIVE ACTION ON SB 48

SEN. MANGAN moved **SB 48 DO PASS**.

Discussion:

CHAIRMAN GRIMES questioned **Ms. Lane** about making a technical change and substituting "advise" for "determine." **CHAIRMAN GRIMES** felt at the hearing there was a lot of concern about counsel making medical decisions in making a determination. **CHAIRMAN GRIMES** feels that advise would have the meaning of counsel, recommend, or to give notice, and advise imports that it is discretionary or optional.

Ms. Lane feels that changing one word would work because of the phrase that follows "in conjunction with the client" so it does not make sense. **Ms. Lane** feels the Committee needs to consider whether there is a need for this bill at all.

SEN. CROMLEY agrees with **Ms. Lane** and does not know if the bill is necessary in that it says the attorney may do something.

CHAIRMAN GRIMES does not necessarily want to add language into the code every time there is a court case. **CHAIRMAN GRIMES** stated that there was a chilling effect in counsel advising clients not getting medical attention. This bill was intended to provide cover so counsel could act freely and not feel restricted in what may or may not be options for a client.

Ms. Lane stated it is her understanding that the case being addressed simply set out standards for attorneys to aggressively advocate for their clients. The case set out the duty to aggressively represent their clients, particularly as to their liberty interests, which they would be giving up if they are sent to the hospital. Somehow, the language of the court created a possible dilemma for attorneys, and this bill was drafted to relieve the attorneys and say even though you have these rigorous standards, an attorney can still advise his client to seek expedited care. **Ms. Lane** deferred the matter to the practicing attorneys on the Committee.

SEN. WHEAT stated that he agrees with **Ms. Lane** that an attorney has a responsibility, at least under the KGF opinion, to represent a person who has potentially a serious mental disease or defect, it is trying to give them a backdoor to get out from underneath their obligation to zealously defend their client.

SEN. WHEAT is uncomfortable doing that. If he thought his client needed this type of treatment and he felt uncomfortable saying

that, he would move that a guardian ad litem be appointed to make that recommendation. There are other avenues available for attorneys without them having to violate their responsibility to zealously defend their client. The language is confusing and establishes different kinds of standards. There is now guidance for this under the KGF decision.

Motion/Vote: SEN. WHEAT moved SB 48 BE INDEFINITELY POSTPONED.
The motion carried 8-1 with McGee voting no.

(Tape : 3; Side : B)

EXECUTIVE ACTION ON SB 57

Motion: SEN. MANGAN moved SB 57 DO PASS.

Discussion:

Ms. Lane circulated proposed amendment SB005701.avl to the Committee **EXHIBIT(jus10a11)**.

CHAIRMAN GRIMES explained that SB 57 is an attempt to define "mental disease or defect" by utilizing New York Civil Code of Procedures definition which came about because of the Wooster case.

CHAIRMAN GRIMES confirmed with Mr. Ed Amberg of the Montana State Psychiatric Hospital that SB005701.avl was the amendment he had suggested.

Motion: SEN. O'NEIL moved Amendment SB005701.avl BE ADOPTED.

Discussion:

CHAIRMAN GRIMES explained the amendment was intended to restrict or not make this so broad you could, as the sponsor of the bill stated "drive a truck through it." One of the concerns of SEN. BOB KEENAN was that this was a broad definition.

SEN. O'NEIL stated that when he moved the amendment, he really intended to have it read "a substantial disorder of thought or mood that significantly impairs judgment, behavior, and capacity to recognize reality" not "or capacity to recognize reality."

CHAIRMAN GRIMES replied that changes the amendment significantly since "and" is conjunctive and would mean they all have to apply.

SEN. O'NEIL withdrew his amendment.

SEN. MANGAN moved **Amendment SB005701.avl** **BE ADOPTED.**

Discussion:

SEN. O'NEIL moved a **substitute amendment** to change the word "or" to "and." **SEN. O'NEIL** explained the reason he feels this is necessary is that if a person is unable to recognize reality, that does not cause any harm. The harm is done when their behavior goes along with that. It is when a person acts on their inability to recognize behavior that society is harmed.

Mr. Amberg, Director of the State Hospital at Warm Springs, explained the proposed language came from a forensic text at the state hospital. The psychiatrists and psychologists at the hospital are very familiar with the application of the law. The important question is has the mental illness impaired the patient's behavior or ability to understand the world around them. The court would typically want to know the level of impairment. Therefore, **Mr. Amberg** believes this definition should be much more narrow than other definitions that relate to civil commitment or mental illnesses the state would reimburse for. This definition goes to criminal accountability. Most people with mental illnesses know right from wrong.

SEN. McGEE asked **Mr. Amberg** to inform the Committee about his background.

Mr. Amberg replied that he has worked at the state hospital for 24 years, has a master's degree in Public Administration and wrote his thesis on patient's rights in the forensic mental health unit.

SEN. McGEE is trying to understand how someone measures judgment or the capacity to recognize reality and whether the measure of these would be manifested in behavior.

Mr. Amberg responded that in very few instances do they have an objective measurement. It is more of a subjective process.

SEN. McGEE stated in order for a person to ever get to the behavior they had to process something mentally. If we say a disorder of thought or mood that significantly impairs judgment, how do we measure a significantly impaired judgment absent a behavior.

Mr. Amberg stated he could not answer the question.

SEN. WHEAT questioned what the title of the forensic text was that provided this definition.

Mr. Amberg did not have the title with him but it was in the letter he gave out at the hearing.

SEN. WHEAT wondered if the textbook had been accepted by the Montana Supreme Court or the district courts has an authoritative text that they rely upon.

Mr. Amberg replied he did not have an answer. He added the wording is very similar to wording used in jury instructions in Alaska.

CHAIRMAN GRIMES supplied the name of the text as referenced in **Mr. Amberg's** letter as being *Forensic Mental Health: Working with Offenders with Mental Illness*.

SEN. WHEAT would like to determine if this text is used by the courts and found to be authoritative. The amendment is overruling a decision by the Montana Supreme Court where that court has conducted extensive research in adopting a standard.

SEN. WHEAT would like to know if this standard is relied upon by other jurisdictions.

CHAIRMAN GRIMES expressed his disagreement relating to **SEN. WHEAT'S** comment that the court conducted extensive research and feels the court probably found the definition most frequently used.

CHAIRMAN GRIMES decided he would like to hold off on taking executive action of SB 57 until the Committee members can do more research.

Motion: **SEN. O'NEIL** withdrew his substitute motion.

Motion: **SEN. MANGAN** withdrew his motion that **Amendment SB005701.av1** BE ADOPTED.

Motion: **SEN. MANGAN** withdrew his motion that **SB 57 DO PASS**.

EXECUTIVE ACTION ON SB 116

Motion: **SEN. GERALD PEASE** moved **SB 116 DO PASS**.

Discussion:

CHAIRMAN GRIMES stated the sponsor would like the Committee to consider proposed amendment SB011601.av1 **EXHIBIT(jus10a12)**.

Motion: **SEN. PEASE** moved **Amendment SB011601.av1**. BE ADOPTED.

Upon the request of **CHAIRMAN GRIMES, Ms. Lane** explained that the amendment would make the seatbelt law a primary offense for which a person could be stopped, apply to only those persons under the age of 18.

CHAIRMAN GRIMES clarified with **Ms. Lane** whether there was current code which required children to be restrained.

Ms. Lane responded there are child restraint laws, but she did not feel those laws applied to kids who were old enough to be driving cars.

(Tape : 4; Side A)

SEN. PERRY depicted to the Committee how difficult it is going to be for law enforcement to determine whether a person is under the age of 18 without pulling them over first. **SEN. PERRY** feels this is not a very good amendment.

SEN. WHEAT agreed with **SEN. PERRY**. While **SEN. WHEAT** agrees that we want to send this message to teenagers that they need to wear their seatbelts, from a law enforcement perspective, it would be very difficult.

SEN. PEASE stated the reason for the amendment was to give the authority to law enforcement to stop a car if it is obvious that there are kids in a car without their seatbelts on. **SEN. PEASE** frowns on making this a primary offense.

SEN. O'NEIL agrees with **SEN. PEASE** and stated if a police officer pulls someone over, and it turns out they are over the age of 18, the police officer can just lecture the person and turn them loose.

Vote: The motion that **SB011601.av. BE ADOPTED failed 7-2, with Senators O'Neil and Pease voting Aye.**

SEN. MCGEE stated that he does not believe the state of Montana needs to take this charge of responsibility of individuals and make it a primary offense. **SEN. MCGEE** believes in individual rights and freedoms and the commensurate responsibility that goes with that. **SEN. MCGEE** charged that he would not be here today if, in 1972, he would have been wearing a seatbelt when he rolled his car. It was the absence of a seatbelt that enabled him to lean over into the passenger side of the car to protect his head. In addition, **SEN. MCGEE** stated not a single constituent asked him to support the law, but many constituents voiced their opposition.

In examining the bill, **SEN. PERRY** stated that 13 people testified in favor of SB 116 and only one person opposed the bill. Not one person, however, said how making this law a primary offense would increase the use of seatbelts. **SEN. PERRY** feels the bill will put a burden on law enforcement and the courts.

CHAIRMAN GRIMES is intrigued by statistics and research he has obtained. **CHAIRMAN GRIMES** stated there was an offsetting argument made in testimony, and some very legitimate research indicated that the secondary seatbelt law is extremely positive for total and non-occupant fatalities, but research also indicated there is a probability making the law a primary offense does not have the desired effect. **CHAIRMAN GRIMES** has heard from constituents in support of the seatbelt law.

A letter from Attorney General Mike McGrath addressed to SEN. McGEE was submitted for the record **EXHIBIT(jus10a13)**.

SEN. WHEAT maintains there are two ways to get people's attention. One way is to be punitive, which is what this bill will do. **SEN. WHEAT** is concerned about making this a primary offense, even though he believes in the philosophy of seatbelts. **SEN. WHEAT** feels it may be more effective to educate young people about the importance of wearing seatbelts not penalize them for not wearing them.

SEN. O'NEIL agrees with **SEN. McGEE** and stated the public must take responsibility for themselves. **SEN. O'NEIL** would like people to wear seatbelts not because it is the law, but because it is their responsibility.

Vote: The motion that **SB 116 DO PASS failed 1-8, with SEN. MANGAN voting Aye by proxy.**

Motion/Vote: It was moved that **SB 116 be INDEFINITELY POSTPONED.**
The motion carried 8-1 with SEN. MANGAN voting no by proxy.

ADJOURNMENT

Adjournment: 11:15 A.M.

SEN. DUANE GRIMES, Chairman

CINDY PETERSON, Secretary

DG/CP

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EXHIBIT (jus10aad)